

STATE OF MICHIGAN
COURT OF APPEALS

PM INNSBROOK, L.L.C., and RH INNSBROOK,
L.L.C.,

UNPUBLISHED
October 17, 2006

Plaintiffs-Appellants,

V

INNSBROOK ASSOCIATES LIMITED
PARTNERSHIP, INNSBROOK G.P., L.L.C., and
ROSS H. PARTRICH,

No. 268796
Wayne Circuit Court
LC No. 05-534292-CZ

Defendants-Appellees.

Before: Murray, P.J., and Smolenski and Servitto, JJ.

SERVITTO, J. (*dissenting*)

Because I believe that summary disposition was premature, I respectfully dissent. Although defendants' motion was brought pursuant to MCR 2.116(C)(8), this Court reviewed the motion under MCR 2.116(C)(10) due to the fact that defendants relied upon documents outside of the pleadings to support their position. Notably, defendants filed their motion in lieu of answering plaintiffs' complaint. It is likely, then, that little, if any, discovery has taken place. Granting a motion under MCR 2.116(C)(10) is generally premature if discovery on a disputed issue is incomplete. *Stringwell v Ann Arbor Pub School Dist*, 262 Mich App 709, 714; 686 NW2d 825 (2004). However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005).

Here, plaintiffs alleged fraud and misrepresentation primarily with respect to the rent rolls. The majority concludes that plaintiffs could not have reasonably relied upon the rent roll information, given the contractual language that the information was "to the best of [defendants'] knowledge, without any investigation or inquiry." However, given that the action is based upon fraud rather than breach of contract, I believe it is only appropriate to allow plaintiffs an opportunity to discover where defendant derived the rent roll amount and if the provided information was, in fact, to the best of defendants' knowledge. The scope of defendants' knowledge with respect to the rent rolls and whether defendants knew that the rent rolls were not accurate may be revealed through discovery.

Additionally, the contract contains a provision that at closing, the rent roll was to be executed, “which shall be updated to and certified by the Seller as true in correct in all material respects as of the Closing.” While the initial rent roll, then, could be without inquiry, a later provision requires that the rent roll be updated and certified as true and accurate for purposes of closing. If, as plaintiffs allege, the rent roll was not true and accurate and defendants had knowledge or reason to believe it was not true and accurate, plaintiffs may well have a claim for fraud/misrepresentation. Because it is impossible to determine at this juncture whether further discovery stands a reasonable chance of uncovering factual support for plaintiffs’ position, I would reverse.

/s/ Deborah A. Servitto